UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

STEVEN KNURR, Individually and On Behalf of All Others Similarly Situated; and CONSTRUCTION LABORERS PENSION TRUST OF GREATER ST. LOUIS,	.	Civil Action No. 1:16cv1031
Plaintiffs,	.	
vs.	.	Alexandria, Virginia
	.	May 4, 2018
ORBITAL ATK, INC., et al.,	.	10:12 a.m.
Defendants.	.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE MICHAEL S. NACHMANOFF
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(APPEARANCES CONT'D. ON PAGE 2)

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(Proceedings recorded by electronic sound recording, transcript produced by computerized transcription.)

APPEARANCES: (Cont'd.)

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P R O C E E D I N G S

THE CLERK: Civil Action 1:16cv1031, Steven Knurr, et al. v. Orbital ATC (sic), Inc. Counsel, please note your appearance for the record.

MR. HERMAN: Good morning, Your Honor. John Herman from Robbins Geller for the plaintiff. With me is my colleague, Katie Douglas, and Mr. Craig Reilly.

THE COURT: Good morning.

MR. ANHANG: Good morning, Your Honor. George Anhang with Shearman & Sterling for all the defendants except Mark DeYoung. Here with me today from Shearman & Sterling is my colleague, Lyle Roberts, and also with us is Doug Fellman from the Hogan Lovells firm.

THE COURT: Thank you. Good morning.

A VOICE: Good morning.

MR. PETRINO: Good morning, Your Honor. Mike Petrino with Kirkland & Ellis for the individual defendant, Mark DeYoung.

THE COURT: Good morning, Ms. Petrino -- Mr. Petrino.

MR. PETRINO: Good morning.

MR. HERMAN: If I may, Your Honor, we have an update. There are three motions that are pending before you now. Counsel for the defendants and myself, we worked and met and conferred until the late hours last night and even into the early hours of this morning. We've resolved two out of the

three motions.

We've resolved the motion to compel regarding Interrogatories No. 1 and 3 against the Orbital defendants, and then we've resolved the claim for documents from Mr. DeYoung.

The only motion that continues to -- we would request Your Honor's ruling on is the motion to compel regarding the internal investigation, and with Your Honor's permission, Ms. Douglas is prepared to address that as Your Honor sees fit.

THE COURT: Thank you. I appreciate the update and the efforts that you went to. I'm sure that you put in many hours yesterday and this morning in coming to those agreements. I don't need to know the details of them. I trust that you have resolved them, and I will dismiss both of those as moot.

I will say that, of course, the Court spent a considerable amount of time preparing to address those issues this morning, and it, of course -- there's limited amount of time in this world, and so it perhaps could have been better spent had I known that you would reach an agreement on those issues, but as I say, better late than never. So I'm glad that you have been able to resolve them.

MR. HERMAN: Yeah. And my apologies, Your Honor. I would have provided notice had we had reached a resolution earlier, but we certainly are, are very cognizant of Your Honor's limited resources, and we apologize for the inconvenience.

THE COURT: Well, I, I accept your representation that you would have contacted me as soon as you could have had there been more time to, to foreclose that, that issue.

So the issue before the Court today relates to the internal investigation and the discovery requests seeking that information. This issue has been briefed extensively on both sides, and I will hear argument at this time.

I will recommend as we begin this argument that we focus on the really important issues. You do not need to repeat everything that's in the papers, and please don't think that I'm being rude if I cut you off and ask questions, but frankly, I think questions will probably be more helpful than a long exposition from either side.

MS. DOUGLAS: Good morning, Your Honor. Kathleen Douglas for the plaintiffs.

THE COURT: Good morning.

MS. DOUGLAS: We have been forced to bring this motion to compel in order to get information, documents, and testimony related to the very relevant internal investigation that was conducted regarding the restatement in this case. I understand Your Honor is very familiar with the arguments in this case, so there's just two I would just like to quickly highlight.

First, defendants have waived any sort of purported privileges as of these documents by disclosing them to the SEC.

They've admitted to disclosing 12,000 documents, having conversations as well as oral downloads of witness interviews. Defendants are not permitted to, you know, forestall prosecution and obtain lenient treatment from the SEC while withholding these documents from the plaintiffs in this case.

That's, you know, *Martin Marietta* counsels that the Fourth Circuit has rejected limited waiver in cases like this, and therefore, it's our position that we are entitled to these oral downloads of these witness interviews.

The second issue I'd like to flag for Your Honor is defendants have been using these documents as a sword and shield in their public SEC filings as well as in this case. They -- the internal investigation was brought up in the restatement, which, you know, the restatement that they filed assuring investors that the restatement had been handled, the scope of the investigation, that the issue has been remediated and that it was isolated.

More importantly, defendants relied on the internal investigation in their motion to dismiss briefing in this case. Judge Ellis cited the internal investigation as part of his support in granting, granting defendants' motion to dismiss on scienter grounds. In addition, they relied on the internal investigation for six affirmative defenses in this case, specifically, No. 21 dealing with conduct of others, saying they cannot be responsible for conduct undertaken by other

people. While that affirmative defense does not specifically reference the internal investigation, it's undoubtedly related to that. And more recently, they've been attempting to diminish the internal investigation's findings in their interrogatory responses.

So, Your Honor, the fairness requires that, you know, we're entitled to these documents because they've waived the subject matter of them by putting them in the public realm and in this case.

THE COURT: Then tell me exactly what it is that you're seeking. Are you seeking all documents, or do you believe that they can validly withhold opinion work product, or do you believe that they have waived it as to everything?

MS. DOUGLAS: Well, Your Honor, we believe that they've, you know, they've done subject matter waiver in regard to any sort of opinion work product. We feel that that has actually already been waived.

They stated that they did disclose some sort of information regarding their, you know, internal impressions, I believe, with the SEC, but what we're really looking for here, Your Honor, is, you know, the witness interview memorandum. They've, you know, already stated that they've disclosed that information to the SEC. It's the underlying data for the internal investigation's public findings, so we're really entitled to that.

In addition, any report summarizing the internal investigation's findings. That --

THE COURT: Do you have any idea how many witness interview memoranda exist?

MS. DOUGLAS: No. We have no idea about that, Your Honor. We have no idea as to what -- who was interviewed, the number of people, the extension of the interview memorandum, which is something that we're claiming we need that information. We're entitled to know, you know, were the defendants even interviewed in this case? Were they not interviewed?

So that is, you know, part of the reason, Your Honor, that we need that information.

THE COURT: Do you think there's any relevance to the fact that they indicate that they have provided oral communications about witness testimony as opposed to any interview memoranda themselves? And I'll, of course, let them address that issue as well.

MS. DOUGLAS: Well, candidly, Your Honor, I think that that's kind of a progression that people have been turning to knowing of these waiver issues. They try and, you know, read over the phone: This is what our interview stated, without actually handing that document over.

But cases have addressed that that's, you know, in our briefing: *U.S. v. Herrera*, which is S.D. Fla. 2017, as

well as *SEC v. Vitesse*, which is S.D.N.Y. 2011, saying that it is inappropriate to basically do these oral downloads of interview memorandum in order to skirt waiver.

So in those cases, they have ordered the parties to produce those underlying interview memorandum that were just disclosed orally, and that's what we're seeking here.

THE COURT: Thank you.

MR. ANHANG: Good morning, Your Honor. Again, George Anhang with Shearman & Sterling for all the defendants except Mark DeYoung. I have three simple points to make here today because I do want to be as brief as possible, but before I get to those points, I want to respond even more briefly to a couple points just made.

On September 26, 2017, Judge Ellis issued a ruling granting a motion to dismiss that was brought with respect to the first complaint filed in this case. I'm reading now from that decision: "In sum," wrote Judge Ellis, "the facts alleged in the complaint tell the following story." I'm on page 38, Your Honor, of his decision.

He then goes on to talk about the facts alleged in the complaint, and his fourth bullet point is as follows: "Individuals below the top executive level did not adhere to company accounting policies and inappropriately concealed from top management information about the Lake City contract's cost overruns."

Your Honor, that's straight out of the investigation. It's quite clear that the facts as alleged in the complaint first filed by these plaintiffs referenced the investigation. The notion that it is the defendants who injected the investigation in this case is, with all due respect, nonsense, Your Honor.

I now turn to the amended complaint that was filed in the --

THE COURT: Well, let me, let me stop you there just because there are so many different parts to this, I may as well ask the questions --

MR. ANHANG: Of course, Your Honor.

THE COURT: -- when they pop into my head.

MR. ANHANG: Of course, Your Honor.

THE COURT: I understand your reference to Judge Ellis's opinion and the fact that the plaintiffs referenced the investigation in their complaint, but is there significance to the fact that they referenced the investigation because Orbital made reference to the investigation in explaining to its shareholders what had happened and had to explain why there had been a $358 million loss that was unaccounted for and what Orbital was going to do going forward to make sure that people were held accountable and that those mistakes wouldn't be made in the future?

Is, is that not part of the evaluation of how the

issue has been raised?

MR. ANHANG: I don't think it is, and let me explain briefly why, Your Honor. The plaintiffs in this case are essentially making what is often referred to as a subject matter waiver-type argument, subject matter because their position is that certain matters relating to the subject of the investigation have been waived as a result of something that the defendants have done. So the argument clearly falls within the rubric of subject matter waiver arguments.

Since the enactment of the new version of Rule 502, that is, Federal Rule of Evidence 502, it's quite clear that there are limitations, important limitations on the subject matter waiver doctrine.

And I'm reading now from the important Advisory Committee explanatory notes, not even regular notes, but the explanatory note with respect to the new version of 502, Your Honor. The rule itself is called Attorney-Client Privilege and Work Product; Limitations on Waiver. Now let me read the operative language:

"Subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading, and unfair manner."

Now, as we showed in our brief, Your Honor, there are multiple elements of that that the plaintiffs simply have not met here. They have not shown that we put protected

information, as they must, into the litigation. Plaintiffs put unprotected information into the litigation. Plaintiffs put no protected information into the litigation, much less did we do so in a selective, misleading manner.

So with respect to subject matter waiver, which is, I think, the world in which these arguments are arising, it's quite clear that the fairness argument -- and opposing counsel concluded with the notion of fairness. I think, in effect, the plaintiffs here are making an argument that in their view, what's going on is unfair, but there is no waiver or work product doctrine pursuant to which fairness and fairness alone is the crux of the analysis, and since 2007, it is Federal Rule of Evidence 502 that places substantial limitations on the ability of a plaintiff to make use of the subject matter waiver doctrine.

Now, Your Honor, returning to the amended complaint in this case, in the amended complaint, paragraph 219, the plaintiffs return themselves to the subject, alleging as follows: "The investigation revealed" -- so right out of the box, they're referring to the investigation. "The investigation revealed among other things that management 'suppressed certain negative information.'"

And there are other references, Your Honor, to the internal investigation in the complaint.

So with respect to the critical prerequisite to

invoking subject matter waiver of the party in question being the one who puts into the litigation protected information, it's quite clear, Your Honor, we haven't put any protected information into this litigation, and we were certainly not the first to inject or introduce the subject of the investigation into this litigation.

THE COURT: Well, let me, let me see if I understand the, the argument and can move this, this matter forward. Is your argument, in essence, that Orbital was entitled to make reference to the results of the investigation in informing its shareholders and the public in general of what the conclusions of the investigation reached, what had happened, why things had gone wrong, who was to blame, who was not to blame, in order to for business purposes get back on the right track, but that in no way waived any privilege associated with that internal investigation?

Is that the argument?

MR. ANHANG: Yes. There, there's a multitude of cases from across the country involving public companies as to which there was an internal investigation about some subject that led to some litigation. This is a case like those cases. The plaintiffs cannot point to any cases out there, they, they do point to *Royal Ahold*, which I want to come back to, Your Honor, but there's simply no doctrine and not even any free-floating cases that suggest that when a company, quite

properly, one would argue, is required to make some disclosure of non-privileged, non-work product information to its shareholders to let them know what's going on, public companies have to do that, and presumably courts would not want to treat that basic information as protected or work product, where the shareholders would not find out that information.

So in case after case, Your Honor, companies, public companies are disclosing limited, unprotected information about an investigation and what happened. There's no waiver in connection with that, and a 502 analysis makes that clear.

I want to clarify one thing, Your Honor: Opposing counsel referenced the fact that to the SEC, there was a disclosure of 12,000 documents and went on to suggest that those 12,000 documents have been withheld from the plaintiffs. I want to say two things about those 12,000 documents, and I don't think plaintiffs' counsel are going to stand up and disagree with either one.

Those 12,000 documents are not privileged or work product materials, and I don't read anything in their lengthy submission suggesting that, and I don't know of any case law that suggests that.

More importantly, Your Honor, those materials were produced to the plaintiffs. Those documents are not what this motion is about. This motion is not about any documents at all. This motion is about oral communications between the

company and the SEC and between the company and Northrop, and on top of that, Your Honor, plaintiffs assert a free-floating subject matter waiver theory that has no basis in any doctrine, no basis in any case law, and no basis in Federal Rule of Evidence 502.

THE COURT: Well, let me stop you there and try and again make sure I'm understanding the scope of the argument here. One of the challenges that the Court has is that this is not an argument about attorney-client privilege or work product based on a privilege log where the Court is looking at some summary of a universe of documents, whether it's 5 or 10 or 10,000 that have been withheld, and that, of course, gets to the enormous amount of back-and-forth that has been presented to the Court by e-mails and telephone calls about who responded when and why you-all didn't come to an agreement on what the privilege log should look like, but I've got to deal with where we are today, which is --

MR. ANHANG: Understood, Your Honor.

THE COURT: -- you've got a dispute.

That dispute is about documents. The plaintiffs don't have a document to look at where they can identify a certain number of discrete items to say we want to challenge the designation in this case or that case or the other case.

So I need to try and either figure out whether I can make a decision today or figure out what I need in order to

make a decision, so maybe you can help me with that. You said that --

MR. ANHANG: I think I can. I think I can very easily.

THE COURT: Well, well, let me ask the question, and then you can, you can certainly add to it. When I asked counsel for plaintiff what, what they were looking for, she identified witness interview memoranda, and so I just heard you say that maybe there's some confusion over what exists and what doesn't.

Are there, in fact, written witness interview memoranda, as one would expect there would be in an internal investigation, that exist right now?

MR. ANHANG: I believe there are notes or memoranda of interviews, Your Honor, but they were not put into this litigation. They were not actually produced to the SEC.

So when Your Honor said the dispute here is about documents, and you mentioned that with respect to the privilege log, I want to be clear that with the SEC, there were only oral communications, and I understand that plaintiffs want access through a 30(b)(6) to a company representative to answer questions orally about the substance of the oral discussions with the SEC, and same goes for Northrop, Your Honor, with respect to whether those oral communications somehow triggered a subject matter waiver with respect to the interview --

THE COURT: I want to break this down into much smaller parts.

MR. ANHANG: Of course, Your Honor.

THE COURT: This is for the benefit of the Court that has to think with small words and small pieces. I understand you to say and I understood from the papers, which is why I asked opposing counsel about the significance of whether they were oral communications or not, that in communicating with the SEC, and we can also talk about Northrop Grumman at some point, perhaps also with Northrop Grumman, that whatever information was disclosed regarding the internal investigation was, in fact, provided verbally, not in writing.

Is that correct?

MR. ANHANG: That's correct. That's my understanding, Your Honor.

THE COURT: Okay. Now, going back five minutes, you mentioned 12,000 documents. Those are written pieces of paper that were provided by Orbital to the SEC; is that correct?

MR. ANHANG: Yes. And they -- none of them were work product, and none were privileged communication.

THE COURT: And your position is that that's not at issue here because those documents have already been turned over?

MR. ANHANG: And not only that; none of them constitute privileged or work product material, so they don't

satisfy --

THE COURT: Okay. We don't need to talk about it anymore. Those 12,000 documents were provided to the SEC. They've been provided to plaintiffs' counsel. They're not at issue here. Thank you. And plaintiffs' counsel has confirmed that.

So what we're talking about, and let's just keep it simple, talk about the SEC right now, is information that was provided to the SEC subject to, and I've read the affidavit from Mr. Fellman, who is here, was information provided to the SEC subject to a confidentiality letter that's attached as an exhibit, I believe, to your opposition that included information that Orbital had gleaned from its internal investigation but was conveyed not in writing but orally to SEC lawyers or staff; is that right?

MR. ANHANG: I think I'm going to allow Mr. Fellman to have the last word on that, but I am, I am sure that, that you're right. So --

THE COURT: Okay. So now my next question to you is --

MR. ANHANG: Yes.

THE COURT: -- and I think I know the answer to it --

MR. ANHANG: All right.

THE COURT: -- when Orbital provided that information to the SEC, they probably relied on documents that had been

generated during the investigation, as opposed to simply their memory; is that correct?

MR. ANHANG: I'm not sure what you mean by "relied on," but to some degree, to some degree, they may have relied in part, but critically, that does not effect -- effect, e-f-f-e-c-t -- a subject matter waiver here because we're in the realm, A, of opinion work product, and the Fourth Circuit has been very clear --

THE COURT: I'm going to stop you.

MR. ANHANG: Please.

THE COURT: I'm going to let you make your full legal arguments.

MR. ANHANG: Thank you, Your Honor.

THE COURT: I'm just trying to get sort of the basic facts, here --

MR. ANHANG: I'm sorry, Your Honor.

THE COURT: -- which is, I'm trying to understand that during the internal investigation -- I'm not asking you to divulge any privileged information, information the Court hasn't ruled on -- that there were lawyers or investigators or other people who worked at Orbital's behest at Hogan Lovells or elsewhere that went and talked to employees of Orbital ATK or Alliant to try and find out what happened with regard to those $358 million; is that correct?

MR. ANHANG: That's my understanding, Your Honor.

THE COURT: And am I correct that they probably somewhere along the way wrote down what people said in some form or another? In other words, with a pencil and paper, making notes, summarizing, or with a laptop computer or in some way so that they could keep track of what everyone said so that when the internal investigation of the people who were writing the eventual report are advising Orbital on what they had found had it, that it was all organized in some way; is that correct?

MR. ANHANG: I believe they did so in a manner which infused those notes with opinion work product protection because what was prepared would have reflected mental impressions, opinions, and legal theories of the lawyers in question, but yes, Your Honor.

THE COURT: Yes. So if I'm understanding, what you're saying is that there were pieces of paper or electronic documents created by the investigators that included information from witnesses, but what I'm hearing you say is they may also have included the mental impressions or subjective views of those individuals about whether they thought someone was believable or other perhaps legal -- legally significant issues as to what it might mean for the investigation.

Is that a fair characterization of what happened?

MR. ANHANG: That's, that's my understanding, Your Honor.

THE COURT: And then that information in some way was shared with whoever it was that spoke with the SEC; is that right?

MR. ANHANG: I believe that there is opinion work product documents that would contain some things that were shared orally with the SEC; that's right.

THE COURT: So let me ask you this question: When there's a controversy over whether such documents, number one, exist, and then it's discovered that they do exist, is the best way to resolve it to provide examples of those documents to the Court for a review to determine whether or not the Court agrees that these include the mental impressions and opinions of counsel or whether or not they are essentially fact memoranda, or if you are familiar with criminal matters, what we would call something like an FBI 302 or report of interview that law enforcement officials engage in when they go out and talk to people and collect information that's then turned over to lawyers, who may then take a look and figure out what the legal significance of that information is?

MR. ANHANG: Your Honor, there's at least two very important reasons that in this case that analysis is not required: first, the confidentiality agreement; second, Rule 502, and in particular, the language from 502 that I emphasized before to the effect that there's only going to be waiver in a situation where into the litigation, that matter has been

introduced by the party in question in a manner that's selective, but let me get back to the confidentiality agreement.

In a context in which there is a confidentiality agreement that on its face covers, however it is you characterize what was disclosed, I think you look first to the confidentiality agreement, and as Your Honor knows in our brief, we submitted, we believe, ample case law establishing that on the basis of the confidentiality agreement here and all the policy and practical considerations underlying it, there's no need to go beyond the analysis given the confidentiality agreement.

THE COURT: Let me ask you this: How do you distinguish the *Royal Ahold* case with regard to confidentiality? There was a confidentiality agreement similar to the one that I believe is attached as your exhibit to your opposition in which there was an agreement that the SEC would hold this information confidential -- confidentially. This was a voluntary disclosure to try and get out ahead of potential litigation with the SEC, but the SEC retained the ability in its discretion to share that information with others that the company that would have otherwise held the privilege was giving up once they chose even under that confidentiality agreement to share.

Can you, can you help me distinguish?

MR. ANHANG: I can, Your Honor. There are multiple ways to distinguish. Let me mention by the way that *Royal Ahold* predated Federal Rule of Evidence 502. It's the 502 analysis and the limitations therein that are required to be followed.

But let me get to *Royal Ahold*. *Royal Ahold,* I think, is helpful to the defendants, and I think the plaintiffs use it in an attempt to preempt arguments that defendants would make.

First, *Royal Ahold* notes the Fourth Circuit case of *In re Doe*, which contains language *Royal Ahold* cited, basically means where a party has a reasonable expectation that the use of the material is going to be limited in the future, they had a reasonable expectation of confidentiality, and under rulings of Judge Ellis himself, that is sufficient to preclude waiver.

In the very next paragraph, Your Honor, here's what the *Royal Ahold* court said. It said: "A confidentiality agreement might be sufficient to protect opinion work product in the case," and that is what was at issue in the case. That's why the court is talking about opinion work product.

In that same sentence, the court goes on to say: "While that's true, in this case" -- all right, the judge here is about to tell us why in his view primarily the confidentiality agreement in that case was not sufficient, and here's what the judge said: "[I]n this case, Royal Ahold already has disclosed information obtained from the witness

interviews to the public and to the plaintiffs through the internal investigation reports."

None of that has happened here, Your Honor. The judge goes through a few more lines of analysis and then says something that is plainly helpful to the defendants here: "Under all the circumstances," the court said, "Royal Ahold has not taken steps to preserve the confidentiality of its opinion work product."

The court was taking pains, Your Honor, to focus on the, the very fact-specific, case-specific analysis that's required, points out that in that case, information obtained from the witness interviews was disclosed to the public and to the plaintiffs, neither of which has happened in this case, Your Honor, and says --

THE COURT: Well, help, help me with that part of it, too.

MR. ANHANG: Yes, Your Honor.

THE COURT: Isn't there an argument that the disclosures of the results of the investigation here are similar to the disclosures in *Ahold*, that simply by explaining what happened, that there were employees at a lower level in the small ammunitions group that didn't do the things a certain way or that the controls weren't appropriate and that there were cost overruns and that Orbital is now going to do things differently and people were fired or disciplined?

Isn't that the public disclosure of what the results of all of those witness interviews led to?

MR. ANHANG: It's not. Earlier in the opinion, Your Honor, the court notes that in the first instance, the public disclosures in that case and the production of several internal reports to the plaintiffs in that case constituted a waiver of the privilege and non-opinion work product as to the disclosed matters.

We don't have that here. What we have here is a public company discharging its duties to its investors by disclosing some bare information about the investigation sufficient to advise investors in a manner that in no way caused a disclosure of protected or work product information, Your Honor.

So, Your Honor, here in this case, what's missing are a lot of the circumstances that drove the analysis from *Royal Ahold*, but we do have a confidentiality agreement. Judge Ellis in a case that we cited in our opposition called *Federal Deposit Insurance Corp. v. Marine Midland* -- and I want to just drop a footnote there, Your Honor. We cited a large number of cases, many of which the plaintiffs ignored in their reply, understandably perhaps; they have limited space; but the fact that they would ignore a Judge Ellis decision was something that we didn't expect.

Here are some things that Judge Ellis said in talking

about waivers: "Waivers must be intentional or knowing acts. If a client wishes to preserve the privilege, he must take some affirmative action to preserve confidentiality. [T]he privilege is typically lost only when waived. And waiver does not typically occur unless a known right is deliberately relinquished."

Under the circumstances, Your Honor, in which oral communications were made to the SEC under a confidentiality agreement -- the SEC here is not any typical federal or state government agency. It's an agency that is so protective for its own policy and enforcement reasons that it has filed amicus briefs, Your Honor, as far away as California urging courts to uphold these confidentiality agreements, and I would invite Your Honor, we provided in our brief a link to the amicus brief that the SEC submitted, and I would invite Your Honor to look at what the court said -- excuse me, what the SEC says about why it's so vitally important for courts just like this court, Your Honor, to uphold these confidentiality agreements.

So, Your Honor, we think under the circumstances where what's being disclosed is being disclosed to a federal government agency that's gone to the remarkable step of filing amicus briefs with courts to uphold these confidentiality agreements, given they -- there were oral disclosures by Mr. Fellman and his colleagues, who are long-established practitioners in this area, given all the measures that were

taken and all the surrounding facts and circumstances, Your Honor, we think it's quite clear that Judge Ellis would say there was no deliberate relinquishment of a privilege here.

THE COURT: Let me, let me turn to another topic, related topic, which perhaps is more fundamental, before we get to the issues of the SEC and Northrop Grumman, which is whether or not this internal investigation would have been required or ordered even in the absence of the litigation that came to pass.

And I understand the timing, which is that the internal investigation, I believe, started in June, late June of 2016, and the restatement that was in August of 2016, and then the lawsuit was filed a few days after the restatement, and the argument is, well, we knew as soon as this problem arose, we anticipated that there would be a lawsuit, and both sides, I think, have quoted Judge Ellis and his saying about the son and the pope and whatnot.

But would there have been an internal investigation setting aside the possibility of litigation at all? I mean, would that have been required for the auditors and for the shareholders?

MR. ANHANG: Your Honor, I believe this company looked at the issues internally and only at some point took the extraordinary measure of getting outside counsel involved at a time when it would have been clear not just to Judge Ellis but

just clear as a matter of common sense that some kind of legal proceedings -- and it didn't have to be this very case; it could have been an SEC enforcement action -- that it was clear that on the horizon were very likely legal proceedings of some kind, and, in fact -- and it may be an issue in part of fact, Your Honor -- but I will represent to you what I understand the facts to be, and Mr. Fellman, if you wish, can elaborate, but the fact is that yes, here, bringing in Hogan Lovells, having them conduct the work on an ongoing basis through the filing of this case and so forth was clearly done because this was a matter that would bring legal proceedings and was anticipated to and obviously did bring legal proceedings upon the company, unfortunately but predictably, as Judge Ellis pointed out.

Now, the plaintiffs don't point to case law, coming back to the law as opposed to the facts, that would suggest that really in a situation like this, given the circumstances here, that it can't fairly be said that there was a genuine anticipation of litigation. And, of course, we're talking about a lot of opinion work product. I don't think it's disputed we're dealing with work product.

We're also dealing with privileged communications, but we're dealing with work product, and I want to remind Your Honor that when it comes to waiver of work product, the courts are clear that the plaintiff carries a burden, and it's a heavy burden, as it should be, because as we point out under *Upjohn*

and *Hickman v. Taylor*, the Supreme Court has enunciated very, very important, vitally important public policy and practical considerations underlying the work product privilege in particular, or the work product protection in particular, and we don't believe that the plaintiffs here can even come close, and we also believe that under principles going as far back as *Upjohn* and *Hickman*, it's clear that the work product here is protected work product because it was prepared because of the prospect of anticipated litigation, which, in fact, not only materialized but materialized very, very quickly.

Your Honor, I was going to speak briefly about Northrop Grumman, unless Your Honor has any questions about anything I've covered so far.

THE COURT: I'm sure that I do, but please proceed.

MR. ANHANG: Well, I'm, I'm mindful that Your Honor has been inundated with very lengthy briefs, with a lot of case cites, and certainly I agree that the most constructive use of our time is to respond to questions you may have. So I'm happy to continue to answer questions.

THE COURT: You're welcome to address Northrop Grumman. I, I assume that the manner in which the information was conveyed is similar to the way in which it was conveyed to the SEC, that your, your -- part of your argument is that this was an oral presentation, that documents or witness interviews or notes from interviews were not turned over to Northrop

Grumman; is that correct?

MR. ANHANG: Well, not exactly. We say a lot about the SEC, and there's a lot to be said in support of our position with regard to the SEC, but one thing we don't say is that there was a common interest between the SEC and, and the defendants here, but there sure was a common interest between the company and Northrop Grumman.

Judge Ellis elsewhere has said, as many, many courts have said, that the common interest rule -- and Judge Ellis has cautioned that it's not a privilege; it's a rule -- he says under that rule, there is non-waiver, where information is communicated to a third party, and I'm now quoting Judge Ellis, "who shares a common interest about a legal matter." A third party who shares a common interest about a legal matter.

THE COURT: Explain to me how Northrop Grumman would share the interests of Orbital. I understand that Northrop Grumman would want to know about what happened because it might affect whether they would choose to engage in a merger or want to go into business with Orbital, but how, how would they be having a common interest?

In other words, is the -- there would be a fear that they might be liable or somehow absorb liability, and therefore, they would have an interest in this information?

MR. ANHANG: Let me answer that in just a few ways. First of all, I just want to make the point, and I think it's

an important clarification, that plaintiffs have indicated that the common interest rule or doctrine does not apply because in some respect, Northrop Grumman can be said to be adverse to Orbital ATK, and the reason I read what I did from Judge Ellis is -- and, of course, we don't accept that there's adversity in the meaningful sense -- but the point is there can be a common interest scenario where the parties are adverse in some respects, but that doesn't impact the analysis. The analysis is is there a common interest with respect to the litigation at issue.

Now, we cited cases in our brief, Your Honor, that we think make abundantly clear that in the context of merger partners in the case of litigation, that those merger partners are going to have a common interest in the litigation insofar as -- and I would add, Your Honor, the plaintiffs themselves in their brief accept and acknowledge that at that time period, as the plaintiffs themselves put it, Northrop Grumman is in the process of consummating this merger transaction with Northrop. So everything is in process. It's a go.

And I think that the commonsense notion underlying the case law that we cited is if you are going to merge with someone and they find themselves a defendant in a lawsuit, as I understand it, claiming hundreds of millions of dollars of damages, that you want your merger partner to win this case because it's important to you, because it's going to impact

you, because if you get joined at the hip with someone who has a very large judgment found against them, it's pretty clear your interest isn't having that judgment avoided, and it's in your interest and going to be in your interest if and when, as we believe will happen here, your merger partner successfully defends the litigation to the point that now you go through with a merger without that potential judgment hanging over you.

So in that sense, we think it's quite clear that there is a common interest, and I want to focus again on a couple words. Judge Ellis says there has to be a common interest, not a complete interest, not a 100 percent alignment, but a common interest in connection with the legal matter, and we think that standard here is very easily satisfied.

But I want to go back to one thing, Your Honor: To be clear, what was disclosed to the SEC pursuant to a perfectly valid and enforcible confidentiality agreement in circumstances where that confidentiality agreement should be enforced, there was disclosure to the SEC of material that was not disclosed to Northrop Grumman.

I think Mr. Fellman's declaration makes quite clear that there was a short, brief phone call, a lawyer-to-lawyer phone call, and the case that I've been citing, in fact, finds no common interest covered the matter at issue in the case that Judge Ellis decided because that was a phone call, and again, we're speaking here of one phone call with Northrop Grumman,

but in the, in the Judge Ellis case, there was a phone call in which no lawyer was speaking for either side.

In this case, Your Honor, it was a lawyer-to-lawyer oral communication, that is to say, a lawyer on behalf of Orbital speaking to a lawyer on behalf of a prospective merger partner, disclosing information in a selective way, infused with opinion work product, including fact work product, and so that conversation itself constituted the transmission of work product lawyer-to-lawyer, which would otherwise be waived except where, as Judge Ellis recognized, where each of the two lawyers in that conversation are representing parties who share a common interest about a legal matter, there can be no waiver.

And I would just end with this, Your Honor, if I may, and then, of course, I'm happy to answer any further questions you have: The plaintiffs actually say in a footnote that our reference to the *Hickman v. Taylor* case is a red herring. It's difficult to understand how that could be so. What's so important about *Hickman*, among many things, is it is the case in which the Supreme Court made clear that it is not just documents that are protected and deserve the highest protection because Federal Rule of Civil Procedure 26 speaks to documents and tangible things.

The significance of *Hickman* is it brings into the analysis intangible things, and that includes conversations, and conversations are the only thing that we're dealing with

here. We're dealing with conversations to Northrop that are alleged to have constituted a waiver of some kind, if not a subject matter waiver, when they didn't, conversations with the SEC that are alleged to have constituted a waiver, if not a subject matter waiver, when they didn't.

And then beyond that, as, as I demonstrated, I think, at the outset, there is this free-floating subject matter waiver argument in which the plaintiffs use the right buzzwords: sword/shield, at issue, but when you look closely, Your Honor, it doesn't comport with Rule 502, as it should, and it doesn't attach itself to any particular doctrine or line of cases, and we readily admit, Your Honor, that where a party puts the nature of an attorney-client relationship at issue as in a legal malpractice case, you don't necessarily need a disclosure by the client of privileged communications or work product.

There is because of the nature of that claim, because you cannot prove legal malpractice, courts say, without necessarily bringing into the case privileged and work product information, in that context, there is waiver notwithstanding 502's limitation, and in the context, Your Honor, of advice of counsel, there again, we freely admit that in the advice of counsel context, as soon as you say "advice of counsel" in an affirmative defense, for example, you are deemed thereby to have opened the door.

There's no advice of counsel defense. There's nothing like it. There's no investigative advice defense that we're raising. The affirmative defenses that the plaintiff points to in, in our answer, A, don't mention the word "investigation." I think it's wishful thinking on their part that somehow those affirmative defenses involve the investigation.

I can represent to you, Your Honor, that the affirmative defenses at issue do not involve the investigation. There's no --

THE COURT: Well, let me ask you a couple of questions to clarify that.

MR. ANHANG: Please.

THE COURT: Does Orbital or do any of the defendants intend to rely on the results of the investigation or the investigation in any way at a trial of this matter?

MR. ANHANG: Only to the extent necessary to respond to ways in which the plaintiffs inject the investigation into this case, forcing us to decide how to respond and perhaps responding in a way that necessarily refers to the investigation.

But if the plaintiffs here today represent to you, Your Honor -- and they seem to think that we're the ones who dragged the investigation into this case, and understand that what I'm about to say is something for which I would need

client approval, but let me say this, Your Honor: If the plaintiffs here today represent that they will not bring out the investigation in this case in any affirmative way, then maybe the way to resolve this issue, Your Honor, if they are willing to do that, is for us in consultation with our clients to determine that on the basis of that, we are prepared to say that we will not raise the substance of the investigation in defense of the case.

But the reason we're here today, Your Honor, is that is not the current posture. The current posture is very different. The plaintiffs from the very first complaint they filed, as Judge Ellis found, have a story that alludes to facts that point to the investigation, and then in their amended complaint, they come back and pound the table about the investigation, and this is among other reasons why, as we put it in our brief, Your Honor, it's the plaintiffs who seem fixated on the investigation, but if they represent to you that they will end their fixation and stop talking about the investigation, that might be a way to resolve this issue, Your Honor.

THE COURT: Okay. Thank you.

MR. ANHANG: Thank you, Your Honor.

MS. DOUGLAS: Your Honor, may I, may I respond to some of his arguments or --

THE COURT: You may.

MS. DOUGLAS: First, Your Honor, I just want to represent that plaintiffs in no way agree to defendants' proposal that we will not be using the internal investigation. It's clear that the internal investigation has backfired on defendants. It's how, you know, Judge Ellis found the, you know, underlying corporate scienter argument here, and they're trying to backpedal from that, so no, we will not agree to that.

I'd like to kind of go through just addressing some of counsel's arguments, if that pleases the Court.

THE COURT: You may.

MS. DOUGLAS: May I respond to certain things?

THE COURT: I may try and focus the argument given the shortness of life, as Judge Ellis would say.

MS. DOUGLAS: Okay. I'll make this very brief then, Your Honor. Counsel made numerous, you know, started by quoting the -- Judge Ellis's order, saying how, you know, plaintiffs relied in the internal investigation, and, you know, I think as Your Honor pointed out, we relied on the internal investigation because defendants put it out there as their defense.

They relied on it to try and say that the individual defendants had no scienter, so, of course, we were going to rely on it. That's classic sword/shield, and that's classic why we would be prejudiced if we did not, you know, get that

underlying information.

If you read -- Mr. Reilly always brings his rule book, so we actually just checked back on Rule 502(a), and it is specifically related to an agency, you know, which would be the SEC, and disclosure to that agency, an intentional disclosure, which was here, so that information has been waived. That's, you know, what 502(a) talks about.

Defendants' argument that they never put any sort of privileged information into the public realm is pretty nonsensical considering in meet-and-confers and in their discovery responses, they've been telling us: All documents regarding the internal investigation are privileged. We won't talk to you about it. We won't put a 30(b)(6) witness up to talk about it, because everything about it is privileged. Yet somehow you were able to, you know, put those results out in the public realm.

The Judge Ellis case that counsel addressed, I want to clarify. That was an inadvertent waiver case. That is not here. Here we're dealing with a voluntary waiver. So, you know, that case does not stand for the proposition that it was being proffered for.

Oh, the SEC has not filed an amicus brief in this case. I think we're all pretty clear on that.

And in regard to the business purpose, that was not something I brought up in my initial argument, but we have

alleged in our briefs that there were numerous factors that support the fact that this internal investigation was done for the purpose of a business purpose. It wasn't just the timing, Your Honor, which that is a very great fact for us. It was also the scope. That internal investigation reviewed all contracts, not just the Lake City contract that was the subject of the restatement.

And also the *Kidder* decision, which we actually did cite in our briefs --

THE COURT: Can you go back to the issue of the scope?

MS. DOUGLAS: Yes.

THE COURT: I'm not sure I understand that point.

MS. DOUGLAS: Yes. Let me just grab this, Your Honor. I just want to make sure I've got everything right.

As we pointed out in our briefs, the, the, the purpose of the internal investigation, the company even said its purpose of the internal investigation was the circumstances surrounding the misstatements in the accounting for the Lake City contract and related manner. That's the -- that's Orbital ATK's own statement as to what the purpose of the internal investigation was. That's a business purpose.

It was to look at the cause of the restatement, the scope of the restatement. You know, if you remember from our complaint, there was a time when they thought the restatement

was, you know, more 2013 heavy. Then it became, no, more year 2014 heavy. Oh, no, wait, it's actually all, all periods.

So part of the internal investigation was to figure out how much is this actual restatement. That's a business purpose. You need to tell your shareholders what's your amount. You know, they did not have that from the front end.

They -- in order to ensure investigators that the cause of the restatement had been remediated and was an isolated incident, they looked at all prior contracts, I believe they were all the contracts that relied on the estimate of completion, and to see whether this problem dealt with just the Lake City contract or all contracts, and that's actually taken from the, the language of the 2015 amended 10-K, which was the February 2017 document, the public filing where they discussed the restatement, and they say as part of the internal investigation, I'll quote: "a comprehensive and intensive review of all relevant material contracts throughout the company."

It was not an investigation just related to the Lake City contract. So that was obviously done for a business purpose.

And then, you know, Your Honor, as you picked up on, the internal investigation began in July of 2016, five weeks before the announcement of the restatement and any litigation in this case, and as we cited in our briefing, I believe it was

Royal Ahold actually held that even when there was an ongoing litigation, defendants' investigation of the restatement still was a business purpose and was not in anticipation of litigation.

So I think that we've, you know, aptly proved that these documents had been waived as to any privilege, and in actuality, they couldn't -- for a lot of these documents, they're not even protected work product, and they don't deserve any privilege as it is.

Let's see if there's anything else I would like to address. In regards to the common interest privilege, as we've pointed out in our brief, defendants are relying on patent cases. That's not where we are here.

If -- you know, in these negotiations, had Orbital disclosed to, to Northrop that, hey, there's all this fraud, we're going to lose, you know, this is the underlying issues that really happened in the internal investigation, you know, Northrop would most likely have asked for and insist on a reserve account. So that is a reserve account for that upcoming litigation.

So, you know, it would have impacted the parties. The parties were adversary. Interests weren't aligned when they were negotiating that acquisition.

And, you know, *Royal Ahold* was not a legal malpractice case. So I think that's an important point to

point out.

And I think for now, there's, you know, there's some of the points I wanted to make responding to counsel's arguments. If you have any further questions?

THE COURT: I'm still trying to understand exactly what the parties think that the Court should do in the absence of a privilege log and in the representations of counsel that we're really talking about oral communications at least with regard to the SEC and Northrop Grumman.

What is it if I were to rule in your favor that you think the Court could do?

MS. DOUGLAS: Your Honor, I think for us, you know, I think a fair ruling will, you know, of course, Your Honor, we feel that we are entitled to, you know, these documents because privilege has been waived, and certain documents are not opinion work product.

One thing, you mentioned an in camera review of these interview memorandums, although it's our position that things are not protected. Counsel is saying that there is opinion work product there, so we think that those documents should be disclosed to us, and actually, we think the best position would be they could be disclosed to us with redactions if that's what they want to do.

Give us the interview memorandum. You can give us redactions as to opinions. Give us a privilege log so then we

have the ability, you know, to figure out what actually of that is opinion work product and what isn't.

So that would be one suggestion, but I really think the written witness statements, as to that, Your Honor, we really feel that that has been waived and we are entitled to those documents.

THE COURT: Thank you.

MR. ANHANG: Thirty seconds?

THE COURT: You can speak for more than 30 seconds.

MR. ANHANG: I can confirm that there's currently scheduled a Rule 30(b)(6) deposition of a corporate representative of Orbital ATK for this Tuesday. There was an extensive oral meet-and-confer on that issue in which I participated, and I know what I said, and I made it clear that there were aspects of the investigation that the corporate representative would be prepared to talk about consistent with the company's public disclosures to its investors that I think we all would have to agree the company not only made but was required to make and didn't waive any privilege or work product protections in making.

So it is a straw man for the plaintiffs' counsel now to suggest that, quote, we won't talk about the investigation. That's simply not true.

Secondly, Your Honor, we continue to think that *Royal Ahold* in some respects supports our position strongly, and in

other respects, it's simply that the plaintiffs here are mischaracterizing it, but in any event, in *Royal Ahold*, the company there said that the investigation was being conducted to satisfy the auditors and there was no such statement here, and besides, *Royal Ahold* was looking at a, sort of a driving force-type inquiry into the anticipation of litigation analysis, which is not the controlling analysis, Your Honor.

I think I understood plaintiffs' counsel to accept the proposition that this case is covered by the Federal Rules of Evidence, including 502, but if you take a close look at it, and again, take a close look at the language that I quoted from the explanatory note, that what the subject matter waiver limitation within that rule is intended to do, it's intended to apply where the party at issue puts protected material into the litigation in a way that's selective and misleading.

It's quite clear that the fact that there was a disclosure here to the SEC pursuant to a confidentiality agreement does not all of a sudden open the floodgates here with respect to work product and doesn't even justify an in camera review. An in camera review is not a consolation prize that you're entitled to when you can't satisfy --

THE COURT: It's certainly not a consolation prize for the Court.

MR. ANHANG: I couldn't agree more, Your Honor, but when the courts are clear that it is the plaintiffs here who

bear the burden of establishing waiver, and it's quite clear they don't even have a doctrine or a line of cases, and again, they continue to intone sword/shield, but there's no doctrine there, if you look at those sword/shield cases, they all involve --

THE COURT: Why don't we back up, and maybe I'm missing something. There is a substantial compliance date of May 1 with regard to the defendants producing documents, was there not?

MR. ANHANG: There was, Your Honor.

THE COURT: And I know that there have been struggles with regards to the production of those documents, and there's been some litigation with regard to what's being produced and what's being withheld.

MR. ANHANG: Unfortunately so.

THE COURT: To the extent that they have sought information about the internal investigation and you have not produced those documents, is it not required by the local rules and the federal rules and this Court's scheduling order that you would produce a privilege log so that the plaintiffs could know and be able to challenge what is being withheld?

MR. ANHANG: Well, Your Honor, I think it was well over a week ago when I communicated with plaintiffs' counsel in the last of what was a string of communications going back to the beginning of the case, and plaintiffs' counsel has never

disagreed with the fundamental proposition that given the burdens associated with a privilege log, particularly an item-by-item one, that it did not make sense for defendants to plow forward and produce a log that was in a form or format that the plaintiffs didn't agree with and insisted be revised.

So I think the case law and the rules and common sense dictate, and you yourself, Your Honor, respectfully, at the last hearing in this case indicated that what was appropriate was for the parties to meet and confer on the format of the log and, barring an agreement, to have motion practice on this issue.

THE COURT: Well, I think what I said was that I expected counsel would be able to reach an agreement on the form of a privilege log, as experienced counsel do in this court every day --

MR. ANHANG: Yes, Your Honor.

THE COURT: -- and that if you couldn't, then I would entertain a motion, and then I think I said but I'd really prefer not to.

MR. ANHANG: Yes, Your Honor.

THE COURT: So I've read all of the e-mails, and I see that unfortunately, my confidence in counsel was not well placed with regard to coming to an agreement because you-all did not do so. So now the question for the Court is who has the obligation in the absence of having reached an agreement to

provide the privilege log?

MR. ANHANG: I would say two quick things: Plaintiffs said something in their brief with which I think we agree, which is -- and I think it's the last thing they said about the privilege log issue. They said given the nature of the waiver issues before Your Honor, it would appear to make sense from the parties' point of view at least to wait for a ruling, because the judge's rulings on these waiver issues, and I don't believe plaintiffs think require a privilege log, and I don't believe they do require a privilege log.

Ruling on the enforceability of the confidentiality agreement here with the SEC does not require a privilege log, and none of SEC in confidentiality agreement cases we've ever seen in any way depend on what the privilege log says about those materials.

So what it is that plaintiffs' counsel in their briefs said with which we agree was, well, if we're looking at how we go forward from here, we are prepared to produce a privilege log.

As I, as I told counsel the last time we spoke, I said in less -- in a week or less -- and I really had "or less" in mind -- we can give you a categorical log. I said --

THE COURT: And you think that's sufficient given the dates in this case and the history of the litigation up to this point, to be telling the Court now that you're prepared to

provide a privilege log a week from now?

MR. ANHANG: Your Honor, it would be a week from now only because of the failure of the parties to reach what I would think would be a commonsense agreement, but I would add something, Your Honor. I know you -- Your Honor should not be burdened with sort of the he said/she said aspect of this, but plaintiffs' counsel has never indicated to us until they filed their motion that they were opposed in principle to the concept of a categorical privilege log.

In fact, they said things to me over the last few weeks that would have led anyone to think that they were on the verge of agreeing, in which case there would be a categorical privilege log submitted at, at this point.

THE COURT: And you decided as a tactical matter that it would be better not to simply go forward and provide a categorical privilege log because you had not gotten an affirmative agreement from them, despite the fact that the burden falls on the party who is propounding or asserting the privilege?

MR. ANHANG: I think there was a, an understanding between me and plaintiffs' counsel that we would resolve this formatting issue before plaintiffs would argue that our log was untimely, and they only raised their untimeliness argument, frankly, in an untimely way, at a time when it was clearly too late.

If, if anyone used this tactically, I think it's plaintiffs. They strung us along, giving indication they were on the verge of agreeing to something that is agreed on everywhere, that's patently reasonable, and then at the last minute, suddenly say: We think it's past due.

When they told us: We think it's past due, Your Honor, first of all, they cited no controlling law that -- where there's a production deadline of, say, May 1, all logs must be produced by then.

In fact, Your Honor, I believe -- and this I'm not completely sure of -- I believe the plaintiffs themselves have not produced a log in this case, so apparently, plaintiffs themselves understand that May 1 was not the deadline both for the substantial production and also the deadline for all privilege logs. I don't think the parties understood that, and I think it's clear from the behavior of, of all the parties in this case.

Lastly, Your Honor, May 1 was a deadline for substantial completion, but I think there was allowance for the fact -- and we had asked for, as Your Honor will recall, a couple extra weeks to complete that phase of discovery, but substantial completion was what was required, with the understanding, we thought, and I think plaintiffs share this understanding, that there were other discrete things that could be provided shortly thereafter.

In a substantial completion world, we did not understand there to be a requirement that a log be produced for everything by May 1, and I don't think the plaintiffs understood that either, Your Honor.

THE COURT: Let's assume for a moment that I'm not persuaded by your arguments and I believe that the plaintiffs are entitled to some documents that they have not yet received. I believe you've made an argument that whatever notes were prepared during this internal investigation of witness interviews were so intertwined with mental impressions and attorney work product that they should not be turned over perhaps even in a redacted form, or do I misunderstand what you've said to me before?

MR. ANHANG: Well, I think that under a 502(a) analysis, early evidence 502, as well as all the cases on work product waiver and nonwaiver, including opinion work product waiver and nonwaiver, I don't think the circumstances here justify a finding that there's been a waiver of any form of work product by the failure to produce a log by May 1, Your Honor.

And this is an issue I would submit has not been briefed, Your Honor, and we would welcome the opportunity -- if Your Honor sees the issue here as coming down to the -- to privilege log, and in their reply, instructively, Your Honor, the plaintiffs --

THE COURT: I'm trying to find a practical solution to resolve this matter, which sooner or later is going to have to be resolved.

MR. ANHANG: And I, and I tried to propose one, Your Honor.

THE COURT: So one of my questions to you is --

MR. ANHANG: Yes, Your Honor.

THE COURT: -- how do you propose if I were to rule against you that I resolve this matter?

I could simply grant the motion and require you to turn over all documents related to the internal investigation. I assume that probably would not be your preferred outcome.

MR. ANHANG: No, Your Honor.

THE COURT: This is your opportunity to give me an alternative.

MR. ANHANG: Well, if Your Honor believes that a privilege log would assist Your Honor in any way, you can believe that we will work 24/7 to produce a privilege log for Your Honor, and we will put as many people as are necessary and pull overnight midnight to 6 a.m. shifts to get that privilege log to Your Honor as fast as any human being can do so.

So I can represent that to Your Honor.

THE COURT: I'm not sure that a privilege log furthers the issue here. I think the question is whether or not there are documents in your possession which could be

turned over to the plaintiff that to the extent you believe there is some way to preserve opinion work product, as opposed to fact work product, simply the results of the interviews, which I think is the essence of what they are looking for, whether or not that can be done either through redactions on your part and turning it over or through the withholding of documents and the Court reluctantly reviewing them to see whether or not the Court agrees that the mental impressions are so pervasive and mixed up in those documents that they can't be redacted or that the Court has to come to a different conclusion.

MR. ANHANG: Well, Your Honor, of course, we would agree to in camera review of any materials you thought necessary to review in camera.

With respect to fact work product versus opinion work product, certainly we can go back and engage in an analysis that we haven't done yet, and I want to explain that in my experience, even privilege logs, and I think plaintiffs will agree with this, do not typically distinguish between fact and opinion, generally in that basis of which protection is asserted, call them privilege logs, it generally says WP work product and an A-C priv., it doesn't get deeper and more granular than that, so for that, for that reason if none other, we haven't performed a document-by-document analysis of fact versus opinion work product, but that is clearly something that

we are prepared to do and then make any of the results of that analysis available to Your Honor for in camera review.

However, Your Honor, we believe we are on very, very strong footing with respect to the legal principles that govern the outcome of the analysis in this case, and I think we'll continue to believe and preserve all our rights with respect to our argument with respect to the, the legal effect of the confidentiality agreement under the circumstances here, the, the proper analysis to be conducted under Federal Rule of Evidence 502(a), the long lines of cases in the Fourth Circuit with respect to work product generally and opinion work product specifically, and then the cases from across the country that we think support our position in every way, and we cited dozens of cases in our brief, Your Honor, as opposed to the plaintiffs here, who think these materials are relevant and thinks that it would be somehow fair, even though relevance and fairness under 502(a) and Supreme Court precedent is not the touchstone.

And the Supreme Court has recognized, as has Judge Ellis, that withholding fact work product as well as opinion work product is an obstruction to the discovery of truth, okay? It is, but the reason that these doctrines are upheld and very important is because there are some very important policy and practical considerations underlying them.

So we are not here to argue these materials are not in any way, shape, or form relevant, but relevance is not the

touchstone of an inquiry where you're dealing with a privilege and work product assertion.

And with that, Your Honor, I'll close.

THE COURT: Do you have any sense of the number of potential witness reports there may be, whether it's in the single digits or the dozens or the hundreds?

MR. ANHANG: I know it's not in the hundreds, and I know that because *Royal Ahold*, of course, literally involved the SEC receiving hundreds of such memos, which is one of many reasons the case is easily distinguished.

So I can represent to Your Honor -- and, of course, I am not with the firm that conducted the investigation, so I don't have as sure a grasp of the details as those whose work product is at issue here, Your Honor. It's not my work product; it's the work product of the good people at Hogan Lovells, including Doug Fellman; but in any event, I can represent to Your Honor that it's here not hundreds. We're talking double digits and not triple, and not triple digits, Your Honor.

THE COURT: Thank you.

MR. ANHANG: Thank you, Your Honor. I greatly appreciate your patience today.

THE COURT: Thank you. I appreciate the effort that everyone's put into this.

I hate to do this, but I'm going to take a brief

recess. I will try and come to some conclusions and rule from the bench shortly, but I hate to prolong this, we all have many other things to do today, but I think we'll be better served if I take a few minutes to collect my thoughts.

Court will be in recess.

(Recess from 11:26 a.m., until 11:40 a.m.)

THE COURT: This matter comes before the Court on plaintiffs' motion to compel with regards to documents related to the internal investigation. I have listened to the arguments of counsel and reviewed the pleadings and tried my best to understand the issues here. I find that the motion should be granted.

Claims of privilege are disfavored. They shield evidence from the truth-seeking process. The party asserting privilege has the burden to show specifically why information should be withheld.

The first question that the Court has examined is whether or not the information sought was created in anticipation of litigation. Litigation, of course, is always possible, especially in these circumstances, but it's clear that in this circumstance, Orbital had other independent reasons reflected in their own documents for conducting this investigation.

I find that the *Royal Ahold* case is on point in many respects. I have looked carefully at the defendants' arguments

and cases and at their emphasis on Federal Rule of Evidence 502(a), and I do not find that it precludes turning over information sought.

However, I find -- and plaintiff has conceded that this case is really about -- this matter is really about a limited request for witness interviews if such documents exist, and this motion is being granted based on that narrowed request.

I find that to the extent witness interview reports were created during the course of the internal investigation in any form, whether handwritten, typed, or transcribed, whether verbatim or summarized, that they must be turned over, although I find that defendant may redact from those reports any opinion of counsel in the form of mental impressions or thoughts, legal analysis, marginal notes, if such things are still done by attorneys or investigators.

I'm going to require that these documents be turned over to the plaintiff, and they can be turned over in their redacted form. I will give the plaintiff an opportunity to challenge those redactions if they believe there is a basis for doing so. I am not encouraging the parties to do so, and once again, I'm encouraging counsel to work collaboratively even in less than ideal circumstances to move this litigation forward.

I will say that if the redactions are challenged and I review in camera a sample of those unredacted interviews and

find that the redactions are not appropriate, I may find that not only with regard to the samples but with regard to all reports, that unredacted versions will have to be turned over. So I am saying this up front to encourage the parties and the defendant to be very careful in redacting what is appropriate in this case.

I am not going to require -- I'm denying the motion with regard to Northrop Grumman. I do find that the common interest does apply. I am finding, consistent with *Royal Ahold*, that these witness interviews that were conveyed in oral form and relied upon through the documents and notes taken are the subject matter that should be turned over.

Is there anything that I have failed to address with regard to legal or factual issues that are before the Court right now? I certainly understand -- we'll address the timing of this in one moment. I certainly understand that there may be differences of opinion over my ruling, but is what I have said clear to the parties?

MS. DOUGLAS: If I may, Your Honor? What about any sort of reports that stemmed from the investigations? I assume those would fall under your order as well?

THE COURT: Come, come to the podium, please. Investigative reports meaning the, some sort of analysis of the entire investigation?

MS. DOUGLAS: An analysis of the underlying memos,

anything like that is kind of what I'm asking more specifically on, reports kind of summarizing the findings of the internal investigation that would most -- that would come from the information obtained from the memos.

THE COURT: No, I'm going to deny the motion. I'm going to deny it on a variety of bases, not the least of which is the concession that what you're really looking for are the raw information of the interviews of the witnesses, which I think are the most relevant to this litigation. I think and I can anticipate, although you do not need to make the argument, that defense counsel would argue that those reports really would be the legal analysis and the opinion of the attorneys about what those facts mean, and I'm trying to be clear in what I'm requiring the defendants to turn over here.

MS. DOUGLAS: Thank you for the clarification, Your Honor.

THE COURT: Thank you.

You'd be snatching defeat from the jaws of victory if you were to speak on that issue. Are there any other issues, though, that you wish to address?

MR. ANHANG: Your Honor, I was only standing to say that your rulings from the bench today are crystal clear to us. We thank Your Honor for your indulgence again for being so patient, as you've been all morning with us. Thank you, Your Honor.

THE COURT: Thank you.

Is there any reason why this can't be done by next Friday at noon?

MR. ANHANG: No reason that I'm aware of, Your Honor.

THE COURT: Thank you.

And I understand, I know one of the issues was Topic No. 1 for the 30(b)(6) deposition. As I understood defense counsel, defense counsel is making a 30(b)(6) witness available to address the internal investigation. The witness should be able to answer questions consistent with my ruling.

That does not mean that there won't be issues that are withheld based on my ruling, just as with regard to the documents, there will be issues that are presumably redacted, but as I understand, and I'll give you a chance to speak, Mr. Anhang, that there will be a 30(b)(6) deponent prepared to testify on the internal investigation.

MR. ANHANG: Yes, Your Honor. And if I, if I was unclear, let me just clarify that. The 30(b)(6) notice laid out a large number of topics. I didn't mean to suggest that the internal investigation was the topic, and so I think it will be a day-long deposition on many, many things, but the documents themselves that you've ordered be produced by Friday is something I think we all can understand are going to be produced as required by Friday.

THE COURT: Thank you.

MR. ANHANG: Thank you.

THE COURT: Is there an issue with the timing of the 30(b)(6) deposition, which I think may be scheduled prior to the day for disclosure of these documents?

MS. DOUGLAS: The 30(b)(6) deposition is currently scheduled for May 8, so it would actually be -- yes, it would be prior to the disclosure of the documents.

THE COURT: Does that pose a problem?

MR. ANHANG: May I make a suggestion?

THE COURT: You may.

MR. ANHANG: We are happy -- and this comes back to my point about there are many, many topics that the plaintiffs properly want to ask questions of our corporate representative about that will fill the time on Tuesday, I'm sure. What we would propose is making a corporate representative available sometime after, which we will do promptly, Your Honor, to address issues relating to the investigation, including, Your Honor, whatever is unredacted in the memos produced on the Friday, Your Honor.

THE COURT: I think that would be appropriate and would give plaintiffs the opportunity to see those documents prior to doing the 30(b)(6) deposition on that topic. I assume there's no objection.

MS. DOUGLAS: No. No, Your Honor.

THE COURT: And I assume the parties will be able to

work for a convenient date without any problem, either.

MR. ANHANG: Absolutely.

THE COURT: Is there anything else that I need to address this morning?

MS. DOUGLAS: Not from the plaintiffs, Your Honor.

MR. ANHANG: Not from the defendants, Your Honor.

THE COURT: Thank you. Thank you for your patience. Court will be in recess.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE TRANSCRIBER

I certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/
Anneliese J. Thomson